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In the Supreme Court of the United States

In Equity

October Term, 1934

No. [redacted] Original

THE STATE OF NEBRASKA,
Complainant,

vs.

THE STATE OF WYOMING,
Defendant.

MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL ANSWER, AND AMENDED AND SUPPLEMENTAL ANSWER

RAY E. LEE,
Attorney General of the State of Wyoming,

ROBERT E. ROSE,

SOLICITORS FOR DEFENDANT.

THOMAS F. SHEA,
Deputy Attorney General,

WILLIAM C. SNOW,
Assistant Attorney General,

OF COUNSEL.

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In the
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Complainant,

vs.

THE STATE OF WYOMING,
Defendant.

MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL ANSWER

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OF COUNSEL.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now defendant State of Wyoming and respectfully moves the Court for leave to file in this court in this cause its Amended and Supplemental Answer to complainant's Bill of Complaint, and herewith presents the Amended and Supplemental Answer proposed to be filed.

And in support of this Motion and as grounds therefor defendant says that defendant appears herein and is charged with the responsibility of appearing not only in its own behalf but representing the rights of thousands of its water users and appropriators along the North Platte River basin in Wyoming, and that in order to prepare an Answer properly setting forth the facts bearing upon the merits of the cause and in order to specifically admit, deny or explain the facts upon which complainant relies in its Bill of Complaint and to set up affirmative matters bearing upon the issues so as to enable the Court to pronounce a final decree in this suit on both the original claims of complainant and the cross claims of this defendant, it was necessary that an extensive investigation be made of facts alleged in complainant's Bill of Complaint and of facts necessary to be alleged in answer thereto. Such investigation was of a technical nature and related to stream flow, voluminous official records, multifarious rights, many thousand water diversions, the extent of the application by users thereunder of waters of the North Platte River to beneficial use both in Wyoming and Nebraska, the rainfall and climatic conditions and the extent of non-user of waters due thereto throughout the reaches of the North Platte River and the Platte River, and many other matters.

Defendant says that during the time allowed for the filing of its Answer it was impossible to complete such investigations and to acquire the information which investigations conducted and completed since the filing of defendant's Answer have shown to be necessary in order to adequately answer the allegations of complainant's Bill of Complaint and to set up the affirmative matters which are the basis of the rights that defendant seeks to have established in this action and to properly apprise the Court and complainant and its counsel of defendant's contentions and of the essen-

tial issues which must be determined in this action in order that the Court may equitably divide and apportion the waters of the North Platte River between the complainant and the defendant.

Defendant says that the proper determination of the issues presented in complainant's Bill of Complaint is vital to the defendant and to its citizens and appropriators of water from the North Platte River and that not less than fifty million dollars of property of defendant and its appropriators is involved and that the prosperity and happiness of thousands of people living along the North Platte River in Wyoming are involved in this cause, and that in furtherance of justice and in justice to defendant, as well as to complainant, defendant believes and says that the attached Amended and Supplemental Answer ought to be permitted to be filed in order that the Court may be in position to do complete equity in this cause.

RAY E. LEE,
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Amended and Supplemental Answer

Comes now defendant and for its Answer to complainant's Bill of Complaint says:

FIRST.

Defendant admits the allegations contained in the first paragraph of complainant's Bill of Complaint.

SECOND.

Defendant admits the allegations contained in the second paragraph of said Bill of Complaint except that it says that the distance from the point where the North Platte River crosses the Colorado-Wyoming line to the City of Kearney, Nebraska, is approximately 625 miles.

THIRD.

Defendant admits that the drainage area of the North Platte River in Wyoming is approximately 22,400 square miles and in the State of Nebraska, to and including the city of Grand Island, approximately 13,000 square miles; that the mean annual rainfall in such area varies from fifteen inches at the Wyoming-Nebraska line to twenty-seven inches at the City of Grand Island, said variation being a gradual increase from west to east, and says that the variation of rainfall is quite uniform, amounting to an increase of about one inch for each twenty-five miles from west to east.

Defendant admits that normally the least rainfall in said area is in the months of July, August and September, and that in the drainage basin of the Platte and North Platte Rivers between the Wyoming-Nebraska line and the City of Grand Island, Nebraska, there are no tributaries of the North Platte and the Platte Rivers supplying substantial amounts of water except the South Platte River and except normally dry washes through which large quantities flow into the said rivers in periods of excessive precipitation and except tributaries conducting return flow and unused waters back to said streams as hereinafter alleged.

Defendant says that the area lying between the Wyoming-Nebraska line and the vicinity of Oshkosh, Nebraska, is largely arid or semi-arid and requires the artificial application of water to it for the purpose of developing its fruit-

fulness, and admits that without such artificial application of water said area, except in seasons of unusual rainfall, will produce only meager crops.

Defendant says that in the area between the vicinity of Oshkosh and the vicinity of North Platte the rainfall and climatic conditions are such that cultivated crops adapted to the area can be and are to a large extent raised without irrigation, and that in a part of said area the artificial application of water to the soil is necessary only to a small extent to supplement natural precipitation.

Defendant says that in the area of said basin from the vicinity of North Platte east rainfall and climatic conditions are such that agriculture can be and is carried on successfully without irrigation, that it is only in periods of drought, extensive in duration and area, that the artificial application of water to the soil is of value in increasing the productivity thereof, and that for many years past irrigation canals and ditches which had at an earlier date been constructed with a view to irrigation of much of the lands of said area have been permitted to lapse into disuse and disrepair because of the fact that irrigation was found in said area to be economically unnecessary and unprofitable, and water previously appropriated has been unused year after year and permitted to flow beyond the confines of said area.

Defendant admits that much of the soil of the said basin in Nebraska is fertile, and alleges that the fertility of much of the soil of said basin has been destroyed by excessive and improper application of water thereto and that the fertility of such areas can be restored only by drainage, which drainage, if supplied, would increase available water for irrigation of such lands in said area as require such irrigation.

Further answering, defendant says that throughout the North Platte and the Platte River basin in Nebraska, and particularly in the areas where irrigation has been practiced for a long period of time, the amount of water necessary to be applied artificially to the soil in order to secure maximum production has greatly decreased, and to the extent that at the present time, in much of the said area, not more than one-half the water originally necessary is now required for such irrigation to produce profitable crops for the reason that the sub-soil has become thoroughly saturated to the extent that the necessity for the application of water is greatly lessened or entirely eliminated, and for the reason

that the skill of irrigators, their familiarity with an experience in irrigating, the discontinuance of the practice of using excessive and unnecessary quantities of water, and the increased leveling or smoothing of the surface of the fields, have made possible and accomplished a more extensive and economical distribution and application of the water to the soil, all with the result that less water is required and a correspondingly greater amount of water will be available for new irrigation projects in Wyoming and in Nebraska.

FOURTH.

Defendant admits that, commencing in the year 1882, and increasingly thereafter, waters flowing in the Platte and North Platte Rivers have been diverted and applied to the irrigation of arable lands within the drainage basin of the Platte and North Platte Rivers, and that the irrigation of such lands has increased from year to year, and says that the number of acres in said basin within the State of Nebraska to which the water of the said rivers has been applied for beneficial uses does not exceed 410,000 acres. And defendant denies that any rightful application of such waters in said basin has been or is prevented by any wrongful act on the part of the defendant. Defendant admits that as to the lands in said basin in the State of Nebraska located upstream from the vicinity of Oshkosh the said lands are largely dependent upon the waters of the North Platte River, and says that as to the lands in said basin between Oshkosh and North Platte the same are less dependent, and as to the lands downstream from North Platte they are still less dependent, if dependent at all, upon the artificial application of water thereto for the production of agricultural crops.

FIFTH.

Defendant admits that the lands in Nebraska irrigated from the North Platte and Platte Rivers lie mostly within the counties of Scotts Bluff, Morrill, Garden, Keith, Lincoln, Dawson and Buffalo, and says that as to the lands to which the artificial application of water is economically necessary and profitable the same lie mostly within the five counties first mentioned, and denies that agricultural developments based upon irrigation in said counties are, or that they have in the past been, practically the sole basis of all wealth in

said counties, and denies that practically the entire population of said counties is dependent for its subsistence, either directly or indirectly, upon the production of crops by irrigation. As to the increase in population and of actual and assessed valuations of land and other property and of crop production, and as to the allegations concerning the development of schools, public buildings, farm homes, sugar beet factories, and as to the value of constructed irrigation works and as to the existence and development of the livestock industry in territory adjacent to the counties mentioned, defendant is without accurate information and therefore denies such allegations. And defendant denies that all such growth and development is the result of the irrigation of lands in said counties, and alleges that such growth and development are contributed to very largely by the use and cultivation of non-irrigated lands.

Defendant admits that complainant derives a part of its revenues from taxes levied upon properties in said counties, and admits that the failure and depletion of the water supply in the western portion thereof, but not in the eastern portion of said basin, would result in economic loss to the inhabitants thereof.

SIXTH.

Defendant admits that complainant State of Nebraska, by a series of legislative enactments and judicial decisions, has incorporated into the laws of the state, but applicable only to the arid and semi-arid sections thereof, the doctrine of prior appropriation of waters, and that in the year 1889 a statute was adopted providing that as between appropriations, the one first in time is first in right, and that in 1895 the legislature of said state revised the statute law relating to the appropriation and use of the natural waters of the state, including in such revised enactments Sections 42 and 43 as set out verbatim in the sixth paragraph of complainant's Bill of Complaint, and that the constitution of the State of Nebraska, adopted in 1920, included and includes Sections 4, 5 and 6 of Article XV, as in said Bill of Complaint set out, and admits that the Nebraska 1895 legislation was largely copied from the Statutes of the State of Wyoming, and that the doctrine that the waters of natural streams are owned by the state and dedicated to the use of the public, and the doctrine of appropriation of waters for

beneficial uses, including irrigation, is and has been recognized in a part of Nebraska for more than forty years, and that such doctrine is recognized by the courts of the State of Nebraska as having been in force prior to 1895 and that the legislation of 1895 made provision for appropriations of water to be made subsequent to said date and for the ascertainment and adjudication of water rights previously acquired by appropriation.

Defendant denies that since 1895, or prior thereto, all applications for permits to appropriate water for irrigation purposes from the naturally flowing streams of Nebraska, including the North Platte and the Platte Rivers, have been made through the administrative officers of the state, and alleges the fact to be that since 1895 all applications for permits to appropriate for irrigation purposes the waters of naturally flowing streams in said state, including the North Platte and the Platte Rivers, have been required by the laws of the state to be made to the said State of Nebraska, through its administrative officers, and defendant says that, notwithstanding such requirements and in violation of the laws of said state, the complainant has, through its public officers and courts, permitted the diversion of water from the Platte and from the North Platte Rivers in disregard and in violation of said statutes and said doctrine of prior appropriation, and in disregard, derogation and violation of the rights of the defendant and of its appropriators.

Further answering, defendant says that the Constitution of the State of Wyoming, adopted in 1890, contained and contains the following provisions:

Section 31 of Article I: "Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved."

Section 1 of Article VIII: "The water of all natural streams, springs, lakes or other collections of still water within the boundaries of the state, are hereby declared to be the property of the state."

Section 2 of Article VIII: "There shall be constituted a board of control, to be composed of the state engineer and superintendents of the water divisions, which shall, under such regulations as may be prescribed

by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state."

Section 3 of Article VIII: "Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests."

Defendant says that from the time of the beginning of the settlement of the territory now embraced within the State of Nebraska up to and including the present, the common law doctrine of riparian rights has prevailed and now prevails as the fundamental, basic law, and has been and is the law of said state, and that the appropriation doctrine is and has in the past been recognized as law within said state only in the arid and semi-arid sections thereof and only in cases where appropriations of water for beneficial use have been made prior to the acquisition of title to riparian lands. The riparian right doctrine has never been recognized or been a part of the substantive law in the State of Wyoming, or, prior to statehood, in the territory now embraced within the State of Wyoming, but, on the contrary, the appropriation doctrine, from the time of the first settlement of the territory now embraced within the State of Wyoming, has been and is now the law, and the only law, relating to the use and disposition of the natural waters of streams, springs, lakes, and other collections of still water.

Defendant says that the laws of the State of Wyoming differ also, and always have differed, in this, that, within the State of Wyoming priority of appropriation made in accordance with the laws of the state govern without reference to whether the appropriation is for direct use or for storage, while in Nebraska appropriations for direct use are by law superior to appropriations for storage purposes without reference to their respective priorities.

SEVENTH.

Defendant denies that the doctrine of appropriation as recognized in Wyoming and Nebraska has at all times or at any time been based upon the principle that he who first initiated an appropriation, diverted the waters and applied

the same to beneficial use, should have a prior right to the same as of the time when the project was initiated and the work was first commenced and diligently carried to completion, and, as to such doctrine as was recognized and in force in the State of Wyoming and to the extent recognized and in force in the State of Nebraska, defendant says that said doctrine gave to the appropriator who acquired his water right in accordance with the laws of the state where his appropriation was made a date of priority as of the date when the right to appropriate was, under the laws of the state where the appropriation was made, duly initiated, and says that, in addition to the elements mentioned, it is requisite to the continued validity of rights acquired by appropriation that the beneficial use of the waters appropriated be continued by the appropriator and not abandoned, and that the right thus acquired is limited in measure and quantity to the amount of water that is continued to be applied to the beneficial use for which it was appropriated not exceeding the legal maximum. Defendant says that such doctrine was legally recognized in Wyoming and in the arid regions of Nebraska prior to 1890, and that the statutory legislation in Wyoming since 1890 and in Nebraska since 1895 provided and still provides for state administration of appropriated waters, both by obtaining a state permit for diversion and by administration and regulation of such diversions by such state officers.

EIGHTH.

Defendant admits that in 1902 the Congress of the United States passed an Act known as the Reclamation Act and that said Act provided, among other things, for the construction in the arid and semi-arid regions of the United States of reservoirs for the purpose of storing unappropriated waters and for the use of such stored waters when needed for irrigation purposes upon such arid and semi-arid lands.

Defendant denies that the storage of such water under said Act was limited to the season when no crops were growing and denies that the storage of such water was limited to waters which could not be directly applied to any beneficial use upon agricultural lands, and says that the purpose of said Act was to conserve the waters of the natural streams in the arid and semi-arid states and to regulate and stabilize

the flow thereof in such manner as to develop a fairly constant and dependable flow and to attain the maximum beneficial use thereof.

Defendant admits the allegations contained in the eighth paragraph of complainant's Bill of Complaint as to the preparation of plans under the authority of said Act for the "North Platte Project", the application to the State Engineer of the State of Wyoming for permission to construct reservoirs for the purpose of storing waters of the North Platte River, the granting of said permit by said State Engineer, and as to the construction under the authority of said Act and of said permit of the Pathfinder Reservoir, with the capacity and location as alleged in said paragraph, and as to the operation of said Reservoir by the Bureau of Reclamation and that such operation is under the authority and subject to the irrigation laws of the defendant State of Wyoming, and as to the construction, completed in July, 1927, of the Guernsey Reservoir, with a storage capacity of approximately 71,000 acre feet of water. And defendant admits and alleges that the purpose and use of said Guernsey Reservoir was and is primarily to regulate the flow of the waters of the North Platte passing through it.

Defendant admits that storage and regulating reservoirs have been constructed in the North Platte basin in Nebraska, with a storage capacity of approximately 77,000 acre feet, and alleges that no other provision has been made in the State of Nebraska for the storage of waters of the Platte or of the North Platte Rivers, or for the regulation of the flow thereof by the construction of dams or otherwise.

Defendant admits the allegations contained in the eighth paragraph of complainant's Bill of Complaint as to the purpose of the appropriation of storage water, the construction of canals to carry such storage waters to the lands upon which they were to be applied, the method of constructing the Pathfinder and Guernsey Reservoirs, the formation of said Reservoirs by the use of the natural channel and the natural contours of the land on either side of the river bed, the use of the natural channel of the North Platte River for the purpose of conducting storage waters when released to points of diversion, and, in so conducting such storage waters, the mingling thereof with the natural flow of said stream, and the determination of the amount of water to which any diversion canal was entitled by bookkeeping

based upon measurements of the quantity released and measurements of the direct flow. Defendant admits that the canals so supplied with storage water from such reclamation projects were and are, by reason of appropriation of waters and priorities granted by the respective states, entitled also to certain rights in the direct flow of said streams; and admits that under the Warren Act (Act of February 21, 1911, Chap. 141, Sees. 1, 2 and 3; U.S.C.A. Title 43, Secs. 523, 524 and 525), the same being an amendment to the United States Reclamation Act, the United States Bureau of Reclamation has entered into contracts with irrigation projects with water rights of earlier priorities in consideration of such projects paying to the United States Government certain stipulated sums.

Defendant denies the allegations of the eighth paragraph of complainant's Bill of Complaint relating to the supplementing of the supply of direct flow water to which the canals in said paragraph mentioned are alleged to be entitled, and in reference thereto defendant says that soon after the enactment of the Warren Act mentioned in said paragraph of complainant's Bill of Complaint, and in 1915 and prior thereto, the United States, purporting to act under the authority of the Warren Act, entered into contracts with the owners of said canals and appropriations, which contracts were substantially uniform in character; and by which it was agreed, in substance, as follows: That the United States would impound and store water in the Pathfinder Reservoir or elsewhere and release the same into the North Platte River at such times and in such quantities as to deliver, and did by said contracts agree to deliver, to the owners of such canals and appropriations, for use on such owners' lands, such amounts of water that would, with all the water that the owners' lands might be entitled to by reason of any appropriations, and with all water not otherwise appropriated including drainage and seepage waters developed by the United States, aggregate a flow according to the schedules of deliveries set out in said contracts. For the purpose of said contracts, September fifteenth was agreed to be the end of the irrigation season.

Defendant says that said contracts contained this further provision: That the delivery thereunder by the United States of the water therein provided for should be in full satisfaction of all rights to which the parties contracting with the

United States were or might be entitled under their direct flow appropriations. Defendant says that at all times since the making of said contracts, the United States, through its Bureau of Reclamation, has supplied said Warren Act contractors pursuant to the provisions of said contracts with the water so scheduled to be delivered, using for that purpose, for the most part, seepage and other waters developed as return flow from said North Platte Project, and that said deliveries as provided for in said contracts have been accepted during all said period of time by said Warren Act contractors in full satisfaction of their claims to the right to divert and use any of the waters of the North Platte River.

Defendant says that during all the time said Warren Act contracts have been in effect complainant has recognized said contracts as the basis of the right to demand the delivery of water for all Warren Act projects and has administered and regulated the diversion of water for irrigation from the North Platte River in Nebraska in accordance with the terms thereof. And defendant says that complainant is now estopped to claim the right to have available for the irrigation of the lands within said projects direct flow appropriations in addition to the amount of water contracted to be delivered in accordance with the terms of said contracts and is estopped to demand and require that the schedule of deliveries provided for in said contracts be satisfied only with storage water from the reservoirs above described and referred to.

NINTH.

Defendant admits and alleges that the purpose of the United States Reclamation Act was and is to authorize the appropriation by the Secretary of the Interior of unappropriated waters flowing in the natural streams in arid and semi-arid states, and, by the construction of dams and other irrigation works appurtenant thereto along such streams, to conserve such waters for application during the irrigation season to arable lands along such streams, and, as applied to the North Platte River, to appropriate the unappropriated waters thereof, and, by the construction of dams and other irrigation works appurtenant thereto along said stream, to conserve the same for benficial use in the states of Wyoming and Nebraska.

Defendant admits that in some years, commencing as early as the month of May, some of the waters directly and naturally flowing in the North Platte River are to some extent needed for the purpose of watering crops being grown upon lands in Nebraska entitled to early priorities, and that from said date until approximately the first of October a part of such direct and natural flow is and has been required for the purpose of supplying such lands with water. And defendant denies that all the natural flow waters of said river are needed or required for irrigation purposes in the State of Nebraska during any of said time and says that in most years no water at all is needed in the complainant state during the months of April or May, and frequently not until late in June; and defendant denies that the natural flow waters of said stream are ever needed for irrigation of lands in the North Platte or the Platte basin as early as the month of April. Defendant admits that all the acts of the United States Bureau of Reclamation in operating Pathfinder and Guernsey Reservoirs, in impounding waters therein and in filling and releasing the same, are subject to the authority of the defendant State of Wyoming, and admits that the defendant State of Wyoming and its officers are charged with the duty of administering such waters fairly and impartially and in accordance with law. Defendant denies that it and its officers are charged with the duty of requiring that water should not be taken for storage when needed for direct flow appropriators and says that they are charged with the control and regulation of the diversion of the waters of said rivers in view of the law relating to the appropriation and beneficial use of such waters, and avers that under the laws of the State of Wyoming no superiority of right attaches to direct flow appropriations over appropriations for storage. And defendant denies that it and its officers are charged with the duty of preventing appropriators with junior rights from taking water which is required by appropriators with senior rights, except that it admits and avers that it and its officers are charged with such duty when and only when the exercise thereof is consistent with the duty of so administering the laws of the State of Wyoming as to accomplish the beneficial use of such waters, which beneficial use is the basis, the measure and the limit of the right to the use thereof. Defendant says that it is not its duty or the duty of its officers to prevent the use of

waters of the North Platte River by junior appropriators in Wyoming except under such circumstances and conditions as shall be equitable between the complainant and the defendant and shall result in the greatest beneficial use of such waters. Defendant denies that with or without its authority the officers in charge of the Pathfinder and Guernsey Dams and Reservoirs have continually or at all obstructed the streams and held back waters for storage purposes in such manner or extent, by diminishing the direct flow or otherwise, as to deprive Nebraska water appropriators having senior rights from obtaining direct flow of any water to which they are entitled by interstate common law or otherwise; and says that the defendant or its officers are not under any legal duty to pass water through either of said reservoirs to appropriators in Nebraska whose rights are junior to such storage rights in Wyoming. Defendant admits that complainant by its duly constituted officers has recently protested to the State of Wyoming and its officers charged with administering the waters of the North Platte River in the State of Wyoming, and to the United States Bureau of Reclamation, and denies that said officers or any of them have refused the complainant any waters of the North Platte River to which it was lawfully and equitably entitled; and defendant denies that it or any of its officers have at any time declared its or their intention to administer the waters of the North Platte River in the State of Wyoming without regard to the rights of the complainant and its appropriators. And defendant says that it has no intention, at any time, to abet or encourage the United States Bureau of Reclamation, to wrongfully, illegally or unjustifiably impound any direct flow water in the North Platte River to which complainant's appropriators are entitled, or to thereby or otherwise deprive such appropriators of water in any quantity to which they may be entitled.

TENTH.

Defendant denies that it has either issued permits or adjudicated priorities for the diversion of water from the Platte River, and admits that it has issued permits and adjudicated priorities for the diversion of water from the North Platte River, and that in so doing it has applied substantially the rule that priority in time of appropriation

gives priority of right, and the further rule that when an appropriation is completed its priority date relates to the date of the filing of the application and map and the payment of a filing fee in the office of the State Engineer, provided that the actual construction of the diversion work is commenced and completed and the application of the water to a beneficial use is actually made within the respective times fixed for those purposes by Wyoming law, and denies that the giving of public notice is a part of such procedure. Defendant admits that the complainant has from time to time issued permits and adjudicated priorities for the diversion of water from the North Platte and the Platte Rivers, and says that as to the manner in which such permits were granted and adjudications were made in the State of Nebraska it is without knowledge. Defendant admits that priority dates in the office of the State Engineer of Nebraska have for many years last past been matters of public record and have at all times been available for inspection by persons interested therein.

Defendant admits that this court, in controversies between states as to the waters of interstate streams, has declared the rule of interstate common law to be that each of such states is entitled to an equitable apportionment of the waters of such streams. Defendant denies that in the case of Wyoming v. Colorado (259 U. S. 419) this court held that in controversies between two states, each recognizing and applying the rule of appropriation of the waters for irrigation purposes, the respective priorities in each state will govern. And defendant says that in the case mentioned this court applied the rule of equitable apportionment of the waters of interstate streams between the states affected, and in the application of such rule recognized the prior appropriation doctrine as applied to that case and, as bearing upon it and the equitable apportionment doctrine, declared the duty of each state of exercising its rights reasonably and in a manner calculated to conserve the common supply by the construction, where feasible, of reservoirs adapted to conserving and equalizing the natural flow, and of making use of the return waters in such a manner as to prevent needless waste and to secure the largest feasible use of such waters.

Defendant admits that complainant is entitled to have apportioned to it such of the waters of the North Platte River as it may be justly and equitably entitled to, having

due regard to the rights of the defendant and its appropriators and with such regard to priorities as under the circumstances of the case and in view of the doctrine of equitable apportionment as between states may be proper.

Defendant admits that the flow of the North Platte River varies from year to year and that careful measurements of the flow of said stream are continuously made at various points along its course and that the quantity of water available for diversion is at all times known to the defendant and that priority dates of all appropriators, as they appear of record in the State of Wyoming and to the extent of the available records in Nebraska, are available and open to defendant, and denies that at all or at any times it has had knowledge or could in the exercise of reasonable diligence have known, except approximately, the quantity of water which it should allow to cross the State line. Defendant admits that in some years the direct flow of waters in the North Platte River is and has been at times and to some extent inadequate to supply all demands, and avers that such inadequacy is the result of the failure on the part of the complainant and its appropriators to adopt any reasonable means of storage or otherwise to conserve the available waters in excess of demands at times when the natural flow furnishes a surplus over and above the quantity needed for immediate use.

Defendant denies that in administering the waters of the North Platte River passing through its territory it has deprived complainant of any water to which it was lawfully and equitably entitled, and denies that it has aided, assisted or abetted any appropriators so to do.

Defendant admits that complainant has recently complained to it, and says that it has at all times recognized all equitable rights belonging to the State of Nebraska and its appropriators, and that it has not at any time disregarded or declared its intention to disregard any of the rights in justice and equity belonging to the complainant or its appropriators in and to the use of waters of the North Platte River, and defendant says that it has no intention so to do.

ELEVENTH.

Defendant admits that plans have been developed by the defendant and the United States Bureau of Reclamation for projects known as the Alcova and Seminoe Reservoirs, having for their purpose the storage of water for the irrigation of 66,000 acres, and no more, of land in the North Platte drainage basin, using therefor the waters of the North Platte River and its upstream tributaries, and that the lands proposed to be irrigated lie west, northwest and southwest of the City of Casper, Wyoming. Defendant admits that for the purpose of creating a supply of water for irrigation of such lands the defendant and the United States Bureau of Reclamation will, unless restrained by this court, construct a dam across the channel of the North Platte River at a point approximately twenty miles south of the Pathfinder Dam to create a channel reservoir known as the Seminoe Reservoir, with a capacity of 1,000,000 acre feet, and another supplementary and regulating reservoir lying in the channel at Alcova, approximately twelve miles below the Pathfinder Dam, with a capacity of approximately 165,000 acre feet.

Defendant says that "dead storage" of water is water stored in such a way that it cannot be drained by flow from its storage place. Defendant denies that the waters which will be impounded in the Alcova Reservoir will be dead storage, and says that the Alcova Dam will be so constructed that all the water impounded in said reservoir can be drained by natural flow into the channel of the North Platte River and that the accumulation of water in said reservoir and the flow of the North Platte River through the same will be so regulated and controlled by the defendant as not to interfere with rights of prior appropriators, either above or below the said Dam.

Defendant denies that reservoirs already constructed or that reservoirs to be constructed "absorb" or will absorb any water, except by evaporation, and alleges that said reservoirs conserve and will conserve waters for beneficial use. Defendant denies that the present storage reservoirs on the North Platte River in Wyoming make use for storage purposes of seventy per cent of the average flow of said river, admits that the Seminoe and Alcova Reservoirs will double the storage capacity of reservoirs on said river in Wyoming, and denies that such reservoirs will unlawfully

or in derogation of any rights of the complainant store the natural flow of said river in any year or the surplus passing down said river in any extraordinary flood.

Defendant admits that it has allotted to the Casper-Alcova Project a permit to store water and has allotted direct flow diversion and irrigation rights sufficient to irrigate the lands on said project.

Defendant denies that between December 6th, 1904 and March, 1934, appropriators of water of the North Platte and Platte Rivers with approximately 69,000 acres of land in Nebraska have been allowed and developed with priority properly belonging to them, and denies that such claimed Nebraska appropriations represent lands actually placed under cultivation by application of water to beneficial use and that pursuant to such claimed appropriations and in reliance thereon large investments have been made in diversion works, canals and laterals for the purpose of conducting waters to any lands and that extensive and valuable improvements have been made on such lands, and denies that it would be unjust or inequitable to recognize the aforesaid priority of the Casper-Alcova Project and canal or that defendant is estopped so to do.

Defendant denies that for many years, or at all, rights in Wyoming or Nebraska entitled to use water for direct application to the land have absorbed all direct flow available in the irrigation season in normal years.

Defendant denies that with proper administration of the Casper-Alcova and Seminoe Projects, there will be available for storage only such extra flood waters as may pass down the channel of the North Platte River in unusual seasons and only water not needed in the storage reservoir for filling Pathfinder and Guernsey Reservoirs.

Defendant denies that it is its intention in the operation of the Casper-Alcova Project to make use of any waters in such manner as to conflict or interfere with the just and equitable rights of any appropriators in the State of Nebraska, or in any manner to disregard any such rights, and says that all water needed or to become necessary in the efficient operation of the Casper-Alcova and Seminoe Project is and will be available without interference with the rights of appropriators from the North Platte River in Nebraska and without damage or injury to the property of the defendant or any of its residents or citizens.

Defendant says that the Casper-Alcova Project is in fact being constructed under two permits granted by the State of Wyoming to the Secretary of the Interior, one providing for the construction of the Seminoe Dam as a storage reservoir with a priority of December 1st, 1931, and the other providing for the construction of the Alcova diversion dam and the Casper-Alcova Canal with a direct flow priority of July 27, 1934; and that a secondary reservoir permit will be granted by the State Engineer of the State of Wyoming to the Secretary of the Interior providing a supplementary supply of reservoir water for said Casper-Alcova Project, with the same priority as the permit for construction of the Seminoe Dam.

TWELFTH

Defendant admits that most of the land in the North Platte and Platte River basin is fertile and productive and that many valuable improvements have been erected thereon.

Defendant denies that any part of the cost of the Seminoe Project will be required to be paid from the lands in the vicinity of Casper proposed to be reclaimed and admits that the cost of the Casper-Alcova Project will be charged to such lands in an amount not to exceed $80.00 per acre; and defendant says that it is just and equitable that such waters of the North Platte River as may be necessary therefor be used for the development of said lands in the vicinity of Casper to be reclaimed thereby.

THIRTEENTH.

Defendant admits that, included in the lands operated under the canals constructed by the United States Reclamation Bureau for the purpose of conducting storage waters impounded in the Pathfinder and Guernsey Reservoirs, are many acres of Nebraska lands, to-wit: not less than 55,000 acres of irrigable land under the Fort Laramie Canal and not less than 100,000 acres of irrigable land under the Interstate Canal, and that such lands, by reason of the priorities established by the Pathfinder and Guernsey Reservoirs, have storage rights of a priority of December 6, 1904, as respects rights in said Pathfinder Reservoir, and priority rights of April 20, 1923, as respects rights in said Guernsey Reservoir.

Defendant says that the Casper-Alcova Project will create an additional diversion demand upon said river of not to exceed 231,000 acre feet annually, which, allowing for return flow, amounts to an estimated consumptive use of only 106,000 acre feet.

Defendant denies that when the storage capacity created by the North Platte Project is utilized there will be insufficient storage water to supply the needs of all lands entitled to such water, and says that with the completion of the Seminoe and Casper-Alcova storage the supply of usable water for irrigation purposes in the North Platte basin in Nebraska will be greatly increased and that there is and will be ample water available in the North Platte River, when properly stored and conserved in Seminoe and Alcova Reservoirs, to amply supply the diversion requirements of the Casper-Alcova Project without infringing upon existing rights.

Defendant denies that it will, or intends to, divide or dispose of available waters of the North Platte River except in such manner as will protect and safeguard existing rights.

FOURTEENTH.

Defendant denies that any wrongs have been committed by it or its officers in the administration of the waters of the North Platte River and admits that some controversy exists between it and some of the users in Nebraska of the waters of said river and says that approximately two thousand farmers in western Nebraska, whose lands are irrigated from the North Platte River, recognize the administration of the waters of the North Platte River by the defendant and its officers as being equitable and proper and are cooperating with the defendant in the defense of this suit. And defendant admits that this court should take jurisdiction of this suit in order to avoid multiplicity of suits and in order that full, complete and equitable relief to all parties may be afforded in one action.

FIFTEENTH.

Defendant denies that complainant has suffered any wrong or is threatened with any wrong by reason of any matters alleged in its Bill of Complaint, and admits that this court has jurisdiction of this cause.

SIXTEENTH

Further answering complainant's Bill of Complaint, defendant says that during a period of more than thirty years last past, during all which time accurate measurements of the flow of the water in the vicinity of Pathfinder Dam and elsewhere along the North Platte River have been taken by competent hydrographers, surplus water not now or heretofore utilized for irrigation purposes in either the State of Wyoming or the State of Nebraska, sufficient to supply the storage proposed to be accumulated in Seminoe and Alcova Reservoirs, has passed down the channel of the North Platte and Platte Rivers without being applied in any of said areas to consumptive beneficial use of any kind, and there will continue in the future to be an ample supply of such surplus waters to serve said Seminoe and Alcova Reservoirs. And defendant says that all the water necessary to accumulate such proposed storage can and will be accumulated at a time in each year when such waters will not be needed or required by any appropriator anywhere along the North Platte or Platte Rivers justly entitled to the use of the same.

SEVENTEENTH.

Defendant says that in the use of the waters of an interstate stream in sections of the country where artificial irrigation is necessary to the development and productivity of the soil it is necessary, in order to obtain the maximum practicable beneficial use of said waters, that each state along said stream make such reasonable use of the waters thereof and apply such means of conservation of such waters as will impound the run-off and thus prevent the waste of such waters and stabilize the flow thereof for use when needed for irrigation. Particularly is this true as to the North Platte and Platte Rivers because of the distance of flow in said streams, which, from the head-waters of the North Platte in Colorado to the junction of the North Platte with the South Platte in the vicinity of North Platte, Nebraska, is approximately 590 miles, and from the head-waters of the North Platte to Kearney, Nebraska, is approximately 700 miles.

Defendant says that in order to so conserve and prevent the waste of the waters of said stream and to stabilize the

flow thereof it is necessary that storage and regulating reservoirs be constructed, maintained and operated in the upper reaches of said stream; and defendant says that for that purpose it has permitted the construction of the Pathfinder and Guernsey Dams in the State of Wyoming and has issued its permits for the construction of the Seminoe and Alcova Dams. That the Pathfinder and Guernsey Reservoirs, with the resulting return flow of storage waters used, have already multiplied many times the quantity of water usable and used in Nebraska for irrigation purposes and consequently the number of acres irrigated in that state, and the construction and use of the Seminoe and Alcova Dams, by the impounding of surplus water and stabilizing the flow thereof for use when needed and the resulting return flow from the use of stored waters, will still further increase the supply of usable water and therefore the quantity of irrigated lands in Nebraska. And defendant says that more than sixty per cent of all the water of the North Platte River has its source in the State of Wyoming and that, due to the elevation above the North Platte River bed of the lands in the vicinity of Casper, Wyoming, proposed to be reclaimed by the use of Seminoe and Alcova storage waters and the general slope thereof to the North Platte River and to other physical conditions, not less than sixty-five per cent of the water that will be required to be diverted annually for the irrigation of said lands will be returned to the stream and pass on down said stream for use and re-use in the North Platte Valley in eastern Wyoming and in Nebraska.

Defendant says that prior to the construction of the Pathfinder Dam and the use of waters stored in the Pathfinder Reservoir for irrigation in eastern Wyoming and western Nebraska, the North Platte River from the Wyoming-Nebraska line as far east as Fort Kearney, Nebraska, was in normal years, during the late summer, a dry bed of sand with little or no water flowing therein and substantially no lands irrigated therefrom, and that with the development of irrigation in eastern Wyoming and western Nebraska, beginning about 1909, by the use of waters stored in the Pathfinder Reservoir and the return flow thereof the North Platte River in that section became a constantly flowing stream. And defendant says that, while immediately prior to 1909 the return flow from the lands in said section amounted to only approximately 25,000 acre feet annually,

such return flow, coming back to the stream from lands along the river irrigated by Pathfinder storage waters, has increased to the extent that it amounts now to approximately 700,000 acre feet annually. And defendant says that on the average, during each of many years last past, due to the failure of complainant to adopt any plan or means for the recapture and storage of such return flow and flood waters and the re-use thereof, there is and has been an annual waste in Nebraska of over two and one-quarter million acre feet of water, most of which water, now wasted in the State of Nebraska without being applied to any beneficial use, could have been at any time in the past twenty years or more, and can now be conserved and stored in Nebraska by the construction of feasible and practicable storage works and used for the irrigation of lands in the North Platte and Platte valleys in Nebraska in such manner and to such extent as to supply all the irrigation needs in that area. And defendant says that in order to make the maximum practicable use of natural flow and the storage flow waters and of flood waters in the State of Nebraska it was and is the duty of the plaintiff and its appropriators to construct at various places along the North Platte River in Nebraska storage and regulating dams, the construction of which has at all times been practicably feasible and the sites for which have at all times existed and are and have been well known and available; and defendant says that notwithstanding said duty, complainant has wholly failed, with the exception of two relatively unimportant and totally inadequate reservoirs, by such means or by any other means to conserve said waters and to regulate and stabilize the flow thereof.

EIGHTEENTH.

Further answering, defendant says that the North Platte River is a meandering stream, particularly from Casper, Wyoming, to its source in northern Colorado, and that the length of said stream, measured by the course of its flow from the head-waters to North Platte, Nebraska, is approximately eight hundred miles, and to Kearney approximately nine hundred and twenty-five miles; that heavy rainfalls frequently occur along the entire length of the stream, producing, for short periods of time, exceptionally heavy flows of water therein; that the time required for the flow of

water, during the irrigation season, from the point where the North Platte crosses the Colorado-Wyoming line to North Platte, Nebraska, is approximately three weeks, the flow of such waters being slower in Nebraska than in the upper reaches of the stream; that due to this condition and to the impossibility of foreseeing climatic conditions and precipitation and to natural and inevitable stream losses, it is exceedingly difficult, if not entirely impossible, to regulate the use of the waters of the North Platte River throughout its course strictly in accordance with the rule of priority and, at the same time, secure the beneficial use of such waters and an equitable division thereof between complainant and defendant.

NINETEENTH.

Defendant says that the lands in Wyoming irrigated by North Platte waters, amounting to approximately 300,000 acres, are fertile lands and produce valuable crops, and are in all respects comparable to the irrigated lands in the North Platte basin in Nebraska in fertility and in the character and value of crops produced therefrom; that all said Wyoming lands are located in an arid district and that none of them are capable of producing crops except by irrigation; that large sums of money amounting to several million dollars have been expended by Wyoming appropriators and landowners in the artificial application of water to said lands, in the culture of said lands and in the erection and maintenance of improvements thereon; and that by reason of the irrigation of said lands from said stream large and prosperous towns and communities have been developed, most of which are dependent upon such irrigation, and which communities and irrigated lands and the very large livestock industry dependent upon said irrigated lands have in years past contributed and now contribute a very large proportion of the tax revenue of defendant and its political subdivisions. And defendant says that any curtailment of the supply of waters now used upon said irrigated lands or any thereof would to a great extent destroy all property values along the North Platte River in Wyoming and would destroy the prosperity of the said communities and would prevent the profitable conduct of the livestock industry in said area and would deprive the defendant and its political subdivisions of a very large part of its and their tax revenues.

Defendant says that Casper, to which the lands proposed to be reclaimed by the Casper-Alcova Project are adjacent, is a city of approximately 16,000 population; that it is the center of the oil industry in Wyoming, having several large refineries and employing a large number of workmen; that it is a wholesale distributing point and railway center, both of which industries, in addition to many others, employ large numbers of people; that it is in the center of a large stock-raising and ranching district, and that said livestock industry is greatly hampered by a lack of forage and feed crops necessary for fall and winter feed and for the fattening of said livestock for market, which forage and feed can be supplied only by the irrigation of the lands under the Casper-Alcova Project in the vicinity of Casper. Defendant says that the City of Casper is remote from highly developed agricultural regions and in consequence the food supplies of its people are required to be transported long distances and at great expense, with a consequent increase in the cost of living, and that the irrigation of the lands under the Casper-Alcova Project affords the only remedy for this condition.

Defendant says that in the negotiations leading up to the granting of the Pathfinder permit and the permit for the construction of the Interstate Canal to irrigate, and now irrigating, approximately 100,000 acres of land in Nebraska, having in mind the interest of the public in Wyoming provided for in Section 3 of Article VIII of the Constitution of said state, defendant insisted that as a condition to the granting of said permits, provision should be made for the irrigation by Pathfinder storage waters of all the irrigable area in the immediate vicinity of Casper, in order that the entire benefit of the storage of water in said Pathfinder Reservoir should not go to the adjoining State of Nebraska with the consequent depletion of the waters which, by its Constitution and act of admission, belongs to the State of Wyoming. And defendant says that said condition was acceded to—though no formal contract was entered into to that effect—by the United States, and in recognition and in furtherance of said understanding and agreement the Secretary of the Interior, at the time of filing the application for the construction of the Pathfinder Reservoir, also filed an application for a permit to construct the Casper Canal for the irrigation of a large body of lands in the vicinity of

Casper, giving in said application as the source of the water supply for said lands the North Platte River and the Pathfinder Reservoir.

And defendant says that the present Casper-Alcova Project is but a belated execution of the original understanding between the United States and the State of Wyoming and that a denial of the waters necessary to carry out said project would be unjust and inequitable.

TWENTIETH.

Defendant says that a portion of the head-waters of the North Platte River are located in the State of Colorado and that approximately thirty per cent of the waters of said river available for use in Nebraska and Wyoming originates in Colorado. Complainant, in this suit, seeks a decree determining the rights of Nebraska and Wyoming to the use of the waters of said river. And defendant says that the waters to be apportioned in this action must, of necessity, involve the waters, extensive in amount, rising in the State of Colorado. Defendant says that the respective rights of Colorado and Wyoming to the use of the waters of the North Platte River have never been determined as between said states, and that the State of Colorado and its citizens now contemplate and for a long time have contemplated and threatened and now threaten the diversion and use in Colorado of waters of the North Platte River, which diversion and use would have the effect of taking from the North Platte River a large quantity of water, to-wit, upwards of 250,000 acre feet per annum, all which water now flows in the channel of the North Platte River into the State of Wyoming, and will of necessity be the subject matter pro tanto of the determination of the rights in this action of the present parties.

Defendant says that if the present suit is permitted to proceed without making the State of Colorado a party, defendant will be subjected to further litigation with the State of Colorado and its appropriators, involving the waters of the North Platte River which constitute the subject matter of this suit. And defendant says that a proper and equitable allocation of the waters of the North Platte River, as complainant well knows, cannot be made between the present parties upon any equitable basis without at the same time determining the rights, whatever they may be, of the State

of Colorado and of its appropriators in said waters. And defendant says that the State of Colorado is a necessary and indispensable party to this action.

TWENTY-FIRST.

Defendant says that for the past twenty-five years and more complainant has had notice and knowledge of the fact that the statutes of the State of Wyoming have made and make no distinction in priority between direct flow rights and storage rights, and during all said time has had notice and knowledge of the manner in which the laws of the State of Wyoming and the waters of the North Platte River in Wyoming have been administered by defendant and its officers, and has had knowledge of the fact that in reliance upon the rights acquired under the laws of Wyoming vast sums of money have been expended by defendant and its water users and appropriators in the construction of irrigation works, in adapting their lands to irrigation, and in the construction and maintenance of improvements thereon, said sums expended amounting to upwards of twenty-five million dollars. And defendant says that, notwithstanding the facts herein alleged and the knowledge of complainant and of complainant's appropriators thereof, neither complainant nor any of its appropriators has taken any steps by legal proceeding to interfere with or question the rights of defendant and its appropriators so asserted, and, on the contrary, complainant has stood by and permitted the exercise of such rights and the making of such expenditures on the part of defendant and its appropriators, and is now estopped to question any of the rights of the defendant and its appropriators as aforesaid.

TWENTY-SECOND.

Defendant says that in 1923 the States of Nebraska and Colorado negotiated and executed what is called the "South Platte River Compact" between said states, which Compact was later duly approved by the legislatures of said respective states and by the Congress of the United States; that the South Platte and the North Platte Rivers, by their junction at or near the City of North Platte, Nebraska, form the Platte River; and that said Compact distributes and apportions between Colorado and Nebraska the waters of the

South Platte River without regard to and without providing for the supply of any waters from the South Platte River for the use of prior appropriators on the Platte River. Defendant says that the effect of said Compact was to relieve the waters of the South Platte River from any and all obligation to contribute to the supply of the waters of the Platte River required for the satisfaction of rights out of the Platte River. And defendant says that in the division of the waters to which the parties hereto may be found by the court to be equitably entitled due regard should be had to the burden which, but for the said South Platte River Compact, would exist and rest upon the South Platte River to contribute its just proportion to the waters required to satisfy appropriators from the Platte River.

And defendant says that because of the matters in this article alleged the State of Colorado is a necessary party to this action and to a final determination of the rights of the parties herein.

WHEREFORE, defendant prays that this court issue its subpoena to the State of Colorado and its Governor and Attorney General, directing that appearance be made by said state before this court at a time to be fixed in said subpoena, and requiring it by an appropriate pleading to show its and its appropriators' interests in the water of the North Platte and South Platte Rivers; that upon final hearing this court find and determine the equitable share of the water of the North Platte River to which the State of Colorado, this defendant and the complainant are respectively entitled; and that the prayer of complainant's Bill of Complaint be denied except to the extent that this defendant has joined therein. And defendant prays for such further, other and different relief as to the court may seem just and equitable.

THE STATE OF WYOMING,

Defendant,

By RAY E. LEE,
Attorney General of the State of Wyoming,
ROBERT R. ROSE,

SOLICITORS FOR DEFENDANT.

THOMAS F. SHEA,
Deputy Attorney General,
WILLIAM C. SNOW,
Assistant Attorney General,

OF COUNSEL.

THE STATE OF WYOMING)
)ss.
COUNTY OF LARAMIE)

RAY E. LEE, being first duly sworn, upon his oath, according to law, deposes and says:

That he is the duly appointed, qualified and acting Attorney General of the State of Wyoming; that as such Attorney General he is the duly authorized solicitor and representative of the defendant named in the foregoing amended and supplemental answer; that he has read said answer and knows the contents thereof, and that the facts therein alleged are true except such facts as are alleged upon information and belief and that as to those facts, said affiant verily believes the same to be true.

RAY E. LEE.

Subscribed in my presence and sworn to before me this 26th day of November, 1935.

ELVERA L. SHULL,
Notary Public.

(SEAL).

My commission expires Nov. 24, 1938.